Editor's note: appealed - rev'd, Civ.No. 82-0165 (D.D.C. Sept. 9, 1983)

ROBERT SEMANKO
MARY L. HOLLEBON
RESOURCE SERVICE CO., INC.

IBLA 81-553
81-554 Decided October 19, 1981

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease offers. W 63144, W 63039.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First-Qualified Applicant

   When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First-Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest (which, by its own term, does not apply to the service agreement) with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7 (1979).

3. Equitable Adjudication: Generally--Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas Leases: Applications: Generally

The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level, and where there was not affirmative misconduct by BLM employees.

APPEARANCES: David B. Kern, Esq., Milwaukee, Wisconsin, for Robert Semanko, Mary L. Hollebon, and Resource Service Company, Inc; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 28, 1978, Robert Semanko and Mary L. Hollebon filed simultaneous noncompetitive oil and gas lease offer drawing entry cards (DEC's) for parcels WY 173 and WY 68 with the Wyoming State Office, Bureau of Land Management (BLM). Robert Semanko's and Mary L. Hollebon's DEC's, which were apparently completely filled out, bore a signed certification that each was the sole party in interest in the offer and lease, if issued, and each was drawn with first priority in the February 1978 drawing for the parcels.

On April 6, 1978, BLM notified Robert Semanko and Mary L. Hollebon that it required further evidence from them in order to determine whether they had violated the regulations requiring disclosure of all parties in interest and forbidding multiple filings by a party on one parcel. Specifically, it requested a copy of any service agreement between them and Fred Engle, d.b.a. Resource Service Company (now Resource Service Company, Inc.) (RSC), whose address appeared on their DEC's.

On April 24, 1978, Robert Semanko filed a copy of his service agreement with Engle, dated February 10, 1978, and on April 25, 1978, Mary L. Hollebon filed a copy of her service agreement dated June 18, 1974, which authorized Engle to act as their sole and exclusive agent to sell the leases for 5 years in return for specified percentages of the sale price and of any retained overriding royalties. Engle's right was vested by each contract itself, was not at Robert Semanko's or Mary L. Hollebon's option, and applied whether Engle, Semanko, or Hollebon arranged the sale.

BLM suspended its consideration of the validity of Robert Semanko's and Mary L. Hollebon's offers pending judicial action on similar appeals presenting controlling issues of law, and on March 13, 1981, issued its decisions rejecting their offers. BLM held that the service agreement gave Engle an "interest" in Robert Semanko's and Mary L. Hollebon's offers which was not disclosed at the time the offers were filed as required by 43 CFR 3102.7 (1979). Robert Semanko, Mary L. Hollebon, and RSC appealed the decisions. 1/

We have considered the question of the validity of offers filed by RSC clients in these circumstances many times in the past and have held consistently that they must be rejected. Robert E. Belknap, 55 IBLA 200 (1981); Wilbur G. Desens, 54 IBLA 271 (1981); Inexco Oil Co., 54 IBLA 260 (1981); Home Petroleum Corp., 54 IBLA 194 (1981); Estate of Glenn F. Coy, 52 IBLA 182, 88 I.D. 236 (1981); D. R. Weedon, Jr., 51 IBLA 378 (1980); Donald W. Coyer (On Judicial Remand),

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1/ BLM has moved to apply the doctrine of collateral estoppel or res judicata to dismiss the appeals of RSC, Semanko, and Hollebon. As the latter two parties have not appeared in any proceedings presenting the same situation, and as there are other parties involved, it is appropriate to issue a decision herein, and BLM's motion is denied.

50 IBLA 306 (1980), aff'd, Coyer v. Andrus, Civ. No. C80-370K (D. Wyo. May 5, 1981) (appeal to 10th Cir. pending); Frederick W. Lowey, 40 IBLA 381 (1979); aff'd, Lowey v. Watt, Civ. No. 79-3314 (D.D.C. May 28, 1981); Alfred L. Easterday, 34 IBLA 195 (1978); Sidney H. Schreter, 32 IBLA 148 (1977); Lola I. Doe, 31 IBLA 394 (1977). We have also affirmed BLM's rejection of offers in which other leasing services held similar undisclosed interests at the time their client's offers were filed. Gertrude Galauner, 37 IBLA 266 (1978); Marty E. Sixt, 36 IBLA 374 (1978). We adhere to these holdings.

[1, 2] The service agreements in effect at the time Engle filed Robert Semanko's and Mary L. Hollebon's offers gave Engle an "interest" in these offers. 2/ This interest was not abrogated by Engle's unilateral attempt to disclaim it, as Engle communicated this putative waiver neither to Robert Semanko nor Mary L. Hollebon, nor was any consideration received from them to bind the contract. 3/

In Lowey v. Watt, supra, Judge Pratt reviewed de novo our ruling on this point in Lowey, supra, and held as follows:

> [T]he IBLA ruled that * * * the disclaimer * * * was * * * invalid because not mutually consented to or supported by consideration. Although authorities are split as to the requirements for an effective disclaimer of a contract right, the common law and majority rule hold a disclaimer valid only if given under seal or in exchange for consideration. Absent a seal or consideration, the disclaimer was ineffective unless the obliged party relied on it to his detriment. Since RSC's disclaimer was not under seal, nor supported by consideration, nor communicated to RSC's clients until after a first place drawing, it did not eliminate its interest in its client's lease offers.

We note additionally that the purported amendment and disclaimer, by its own terms, does not apply to the service agreement between Engle and Robert Semanko. The agreement between Engle and Semanko was entered into on February 10, 1978, well after January 13, 1977, the date of the amendment and disclaimer, which clearly applies only to agreements extant on January 13. Thus, the purported disclaimer, even if legally effective, could not have applied to the offer. Home Petroleum Corp., supra at 204; D. R. Weedon, Jr., supra at 382; Frederick W. Lowey, supra at 385-86.

2/ Donald W. Coyer (On Judicial Remand), supra at 312; Frederick W. Lowey, supra at 383; Alfred L. Easterday, supra at 198; Sidney H. Schreter, supra; Lola I. Doe, supra.

3/ Donald W. Coyer (On Judicial Remand), supra at 313; Frederick W. Lowey, supra at 384-92; Alfred L. Easterday, supra at 199.

In Lowey v. Watt, supra, Judge Pratt also held as follows:

> The IBLA concluded * * * that RSC's disclaimer was not effective to eliminate its interest in any client's lease offer for which the service agreement was signed after the date of the disclaimer. We find this conclusion unassailable. The disclaimer states that Engle "is a party to various contracts" and that he waives any rights "which [he] may have by reason of said service agreements." In addition to the disclaimer's plain language, it is well established that a release that purports to discharge future rights and claims not yet in existence is not operative to discharge any rights under a contract made subsequently to the release.
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> > [A] manifested intention [to create an obligation that] is in conflict with the words of the release . . . will prevail over it because later in time. . . . So, also, a contract that is entirely inconsistent with the terms of a previously executed release will prevail over that previous release and destroy its operation.
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> 5A CORBIN, CONTRACTS § 1238, at 560 (1964). The exclusive agency provision of the subsequent service agreement was entirely inconsistent with the language of the earlier release. The earlier disclaimer could not reach or eliminate RSC's interest in * * * offers [such as Semanko's]. [Footnote omitted; emphasis in original.]

Robert Semanko and Mary L. Hollebon failed to disclose Engle's interest at the time they made their offers as required by 43 CFR 3102.7 (1979), and they must therefore be rejected because this violates the regulation. 4/

[3] The question of whether the Department is estopped from rejecting Engle's client's offers was fully considered in Donald W. Coyer (On Judicial Remand), supra at 313-14. We adhere to our holding there that the Department is not estopped to reject these offers.

After noting that the authorities have held that "affirmative misconduct" may give rise to equitable estoppel against the Government, Judge Pratt held as follows about the same circumstances at issue in the instant case:

4/ Donald W. Coyer (On Judicial Remand), supra; Gertrude Galauner, supra; Marty E. Sixt, supra; Alfred L. Easterday, supra; Sidney H. Schreter, supra; Lola I. Doe, supra.

The BLM officials' actions do not approach the requisite level of "affirmative misconduct." Although the officials erred in agreeing to accept RSC's disclaimer, they did so at RSC's request and to protect RSC's clients until RSC could put a revised service agreement into effect. Further, it would be a misstatement to assert that RSC is without blame. It had notice as early as December of 1976 that its exclusive agency provision was improper and was in clear violation of the regulations, yet it refused to change its service agreement for fifteen months. RSC could have entered new service agreements with its existing clients but declined to do so. Plaintiffs have no entitlement to the leases for which they submitted offers, but a mere hope or expectation. Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); McDade v. Morton, 353 F. Supp. 1006, 1010 (D.D.C. 1973); aff'd, 494 F.2d 1156 (D.C.Cir. 1974). Against these considerations we must balance the public interest in fair administration of the noncompetitive lease program. All offerors are entitled to assurance that the Government will impartially enforce its regulations. Plaintiff's claim of Governmental estoppel is without merit. [Footnote omitted.]

Similarly, in D. R. Weedon, Jr., supra at 383-84, we considered and rejected the suggestion of Engle and his clients that it is unfair to give retroactive effect to our decision to reject offers such as this in which Engle had an undisclosed interest. We adhere to our holding there as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing

Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge